

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 6 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

The Lutheran Church/Missouri Synod)	MM Docket No. 94-10
)	
For Renewal of Licenses of Stations)	File Nos. BR-890829VC
KFUO/KFUO-FM, Clayton, Missouri)	BRH-890929VB

TO THE REVIEW BOARD

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**REPLY EXCEPTIONS OF THE MISSOURI STATE CONFERENCE
OF BRANCHES OF THE NAACP, THE ST. LOUIS BRANCH OF THE
NAACP AND THE ST. LOUIS COUNTY BRANCH OF THE NAACP**

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1. The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP ("NAACP") respectfully reply to the November 1, 1995 Limited Exceptions of The Lutheran Church-Missouri Synod ("KFUO Exceptions").

I. KFUO Intentionally Deceived The Commission

2. In excepting to the I.D.'s^{1/} finding that KFUO committed multiple deliberate misrepresentations,^{2/} KFUO contends that the I.D. mischaracterized as "highly misleading" several statements in KFUO's 1989 EEO program.^{3/} I.D. at 9913 ¶230. KFUO also contends that the I.D. erred in finding a lack of candor in KFUO's pleadings which contended that classical music knowledge was a requirement for a position as a KFUO-FM salesperson. See KFUO Exceptions at 11.

3. The classical music allegations may be disposed of very easily, since KFUO does not dispute the ALJ's conclusion that "giving the Church the benefit of all possible doubts, only 8 of the 15

1/ The Lutheran Church/Missouri Synod (I.D.), 10 FCC Rcd 9880 (Steinberg, ALJ, 1995).

2/ KFUO maintains that on occasion, licensees which failed to affirmatively recruit and hire minorities "were not even charged with a lack of candor", citing California Renewals, 9 FCC Rcd 894 (1994) and Texas Renewals, 9 FCC Rcd 879 (1994). See KFUO Exceptions at 9. Those cases are far afield from this one. One of the stations in California Renewals failed to use minority sources, but it never claimed it did use these sources and it hired minorities at 100% of parity with their workforce representation. Id. at 900. The other applicant used minority sources frequently, it offered five jobs to minorities, and there was no suggestion that it told the Commission that it engaged in practices it did not follow. Id. at 902-905. See also Texas Renewals, 9 FCC Rcd at 885, 887-88 and 889-90 (to similar effect).

3/ This language appears in KFUO's 1989 EEO Program. See I.D. ¶230.

[1] When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. [2] We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. [3] We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. [4] See sample reply form attached.

individuals hired for the position of Sales Worker during the License Term had some classical music background or experience." I.D. at 9916 ¶248. There is no evidence that job applicants were told that classical music background was required, or that classical background was actually used as a selection criterion.^{4/}

4. KFUD posits three defenses regarding the statements in its EEO Program: (a) the I.D. erred by failing to consider the "context in which [the] statements were made" (KFUD Exceptions at 6); (b) KFUD had no "motive" to deceive (id. at 13) and (c) KFUD officials testified truthfully (id. at 7-8). Each argument is without merit and, considering the source, each argument is of questionable credibility.^{5/}

5. First, what KFUD apparently means by the statements' "context" is that KFUD intended the statements to refer to a snapshot in time rather than the entire renewal term.^{6/} That construction of Form 396

^{4/} KFUD's defense of "advice of counsel" is totally without merit. See KFUD Exceptions at 12. Even where counsel gives incorrect advice, such advice does not shield an applicant from liability. See, e.g., Carol Sue Bowman, 6 FCC Rcd 4723 ¶4 (1991). Here, however, the ALJ was troubled not by counsel's advice but by the false factual premise of nonexistent job "qualifications" embedded within that advice. KFUD itself was the source of the false facts.

The Board should bear in mind that KFUD's false factual premise was used for a particularly repulsive "argument": that because African Americans supposedly are not regular listeners to classical music, they are presumably less qualified to work at a classical station. Where, as here, listenership to the stations was never a job requirement, such an argument could not be more invidious. Understandably, KFUD wants to abandon this horrible argument now, but it's too late for that.

^{5/} KFUD wasn't an EEO-proactive licensee tripped up by byzantine rules propounded by an overzealous federal agency. This licensee didn't even include "equal opportunity employer" notices in its job advertising, and did virtually nothing to recruit minorities for employment. See I.D. at 9892 ¶80 and 9910 ¶210.

^{6/} KFUD also contends that the term "qualified persons" is not specifically defined in Form 396. See KFUD Exceptions at 7. But at trial, where KFUD had the burden of proof, KFUD never attempted to show that it was confused about the meaning of this term. Certainly if the word "qualified" means anything at all, it means that the qualifications expected of applicants do not violate federal nondiscrimination laws.

is absurd. Giving Form 396 the shapshopt in time construction proposed by KFUE would impute to the Commission the intention of allowing licensees to be equal opportunity employers for one day and discriminators the remainder of the year. That is absurd, as it would deprive Form 396 of all meaning. In any event, when KFUE filed its application, KFUE fully understood that Form 396 sought information about more than just an instant in time.^{7/} Moreover, KFUE's statements in Form 396 were not true when they were filed,^{8/} or at any other instant in time.^{9/}

6. KFUE's second contention -- that it lacked a "motive" to deceive -- is nondecisional, since motive is not a necessary element of intent. Nor is KFUE's premise accurate, since KFUE does not dispute that its application and predesignation pleadings were motivated by its desire to avoid scrutiny from the EEO Branch and the

^{7/} For example, KFUE's February 23, 1990 Opposition to Petition to Deny stated that "KFUE has drawn on multiple referral sources throughout its license term" (emphasis supplied). KFUE Ex. 4, Tab 7, p. 16. KFUE knew that this was not true. See KFUE Ex. 4, Tab 6.

^{8/} KFUE's suggestion that the statements in the renewal applications were true when they were made is based on the fact that KFUE-FM's former General Manager, Tom Lauher, supposedly undertook steps to comply with the EEO Rule. KFUE Exceptions at 9. But Lauher's actions occurred between March and July, 1989. The renewal applications were filed on September 29, 1989, well after KFUE had ignored all of Mr. Lauher's advice and abandoned even the ministerial steps he had taken. See I.D. at 9893-9900 ¶¶88-135.

^{9/} KFUE at no time contacted "the various employment services" and "actively" sought female and minority referrals" before, during or after filing its renewal applications. See NAACP Exceptions at 11-12. KFUE did not deal with secular employment agencies. KFUE Ex. 4, Tab 6. There is no evidence that KFUE ever told a state employment agency that it had a job vacancy. It didn't even notify its parent body's Black ministry office of job openings. Tr. 718-20. And KFUE's "reply form" was not a "sample" at all. The word "sample" implies common and routine usage. KFUE well knew that that was not true, since the form was only used once. I.D. at 9898-99 ¶¶119-123. Furthermore, the "reply form" was a meaningless document, since the accompanying letters to putative recruitment sources said that KFUE would be contacting them as openings arise -- which never happened. Id. at 9898 ¶122.

NAACP.^{10/}

7. Finally, KFUE's contention that its officials testified truthfully is irrelevant. Truthful oral testimony does not cure false written testimony. At best, the absence of false oral testimony simply avoids penalties for perjury on top of penalties for the underlying misrepresentations. The Commission's standard of conduct is not so low that an applicant may lie at will in written filings as long as it later tells the truth in an evidentiary hearing.

II. The I.D.'s Conclusion That KFUE Committed Religious Discrimination Violated No Rights Or Expectations Of KFUE

8. The NAACP can add little to the I.D.'s analysis of the free exercise issue, which has the law exactly right. See I.D. at 9909 ¶¶201-204. Only three additional brief points are worth making here.

9. First, KFUE has made no effort to explain how the support staff positions at issue here^{11/} -- engineer, receptionist, secretary, janitor -- are connected in any way to the espousal of KFUE's religious views, or how a nondiscrimination requirement for these positions burdens KFUE's speech. Entirely missing from any KFUE pleading is a showing of how KFUE's right to preach the gospel over

^{10/} KFUE complains that the ALJ used Tom Lauher's memoranda, which notified station officials that KFUE was not complying with the EEO Rule "as the basis for inferring a motive to deceive." KFUE Exceptions at 14. KFUE argues that "[s]uch an inference could well serve to discourage licensees from undertaking efforts to evaluate their EEO programs for fear that subsequent efforts might not be sufficient -- hardly an outcome the FCC should want." Id. But Lauher's memoranda were not KFUE's "undertaking efforts to evaluate" an EEO program. Lauher's memoranda were both unsolicited and disregarded. I.D. at 9898-9900 ¶¶119-135. It is absurd that "an outcome the FCC should want" would be that a licensee should discourage employees from internally reporting EEO violations in order to preserve, for the licensee, the opportunity to later claim ignorance and blame subordinates for any misconduct.

^{11/} KFUE's Exceptions only go so far as to state that "[d]uring the License Term, the Church believed in good faith that many of the job functions at the Stations required a knowledge of Lutheran doctrine and philosophies" (emphasis supplied)." KFUE Exceptions at 17. Actually, KFUE's job application form imposed religious qualifications on applicants for every job by stating that KFUE retained the right to give hiring preferences to persons who were members in good standing of a Lutheran congregation. I.D. at 9911 ¶219.

KFUO was infringed by this nondiscrimination requirement. Entirely missing is any showing that a single sermon, lecture, prayer or other manifestation of religious speech was chilled, or could not have been broadcast as robustly, if the janitor, engineer or secretary on duty were not a Lutheran.^{12/} KFUE's injury is hypothetical and speculative and does not approach the level of a constitutional tort.^{13/}

10. Second, as the I.D. explains, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) did not overrule King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert denied, 419 U.S. 996 (1974) because the Commission's EEO requirements are distinct from those of Title VII. See I.D. at 9909 ¶202. Unlike Title VII, the EEO Rule promotes, inter alia, the Commission's goal of licensing only applicants with good character^{14/} and its goal of promoting diversity of viewpoints.^{15/} Consequently, the Commission is on solid constitutional ground in enforcing the EEO Rule's prohibition on religious discrimination, so long as that prohibition is narrowly tailored to the government's legitimate interests in maintaining the good character of its

^{12/} In this regard, KFUE's implication that the Commission might be inclined to "refuse to license radio stations to religious groups" is inflammatory and absurd. See KFUE Exceptions at 22.

^{13/} Indeed, during the license term, KFUE never complained that it felt any such burdens. This shows that KFUE's free exercise argument is nothing more than the clever theory of new counsel, and not a valid expression of any burdens KFUE may actually have felt.

^{14/} "[I]ntentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978).

^{15/} NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

licensees and promoting diversity.^{16/} The "narrowly tailored" requirement is met here, since the Commission has exempted from the nondiscrimination requirement those positions, such as general manager, program manager, producer and announcer, which might involve religious-related duties.

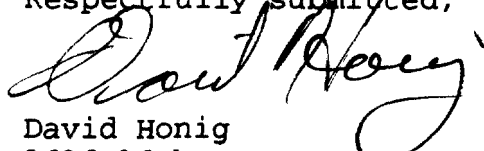
11. Finally, there is no merit to KFUD's suggestion that the Commission is prevented from applying the Communications Act to stations licensed before its adoption. See KFUD Exceptions at 22. That question was settled with the Radio Act of 1927, when Congress required licensees (including KFUD(AM), which was founded in 1924) to waive any claim to "any particular frequency or wave length or...the ether as against the regulatory power of the United States." J. Roger Wollenberg, "The FCC as Arbiter of 'The Public Interest, Convenience and Necessity,'" in Max Paglin, Ed., A Legislative History of the Communications Act of 1934 (1989) at 61, 72.

^{16/} KFUD contends that in enacting the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb-1 (the "RFRA"), Congress found that agencies must first demonstrate a "compelling governmental interest" and show that the burden is the "least restrictive means of furthering that compelling governmental interest." KFUD Exceptions at 16-17 n. 4 (citing 42 U.S.C. §2000bb-1(b)). KFUD maintains that "[t]here is no evidence that the FCC has reevaluated its EEO Rule to ensure compliance with the RFRA." KFUD Exceptions at 17 n. 4. But such reevaluation was unnecessary because the EEO Rule has already complied with the standards in the RFRA. When the Commission enacted the EEO Rule, it expressly found that the public interest is not served by licensees who engage in intentional employment discrimination. Broadcast EEO, 18 FCC2d 240, 241-42 (1969). In Broadcast EEO, 9 FCC Rcd 2047 ¶1 (1994), the Commission emphasized that

the overriding goal underlying our EEO rules is to promote program diversity. In addition, our EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus, the rules also promote the further development of the broader communications infrastructure.

Furthermore, the means used to enforce the EEO Rule could not be less restrictive. The FCC does not intervene in individual hiring decisions. Instead, it simply requires licensees to eschew religious discrimination. The fact that it has been 22 years since the Commission had cause to question a single religious licensee's compliance shows that the EEO Rule could not be less restrictive if the Commission tried.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David Honig", written in dark ink.

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December 6, 1995

CERTIFICATE OF SERVICE

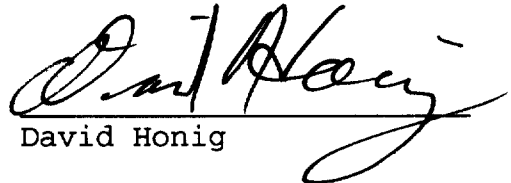
I, David Honig, hereby certify that I have this 6th day of December, 1995, caused a copy of the foregoing "Reply Exceptions" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

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